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Nos. 07-1428, 08-328

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In The

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, KAREN DUBOIS-WALTON, THOMAS UDE, JR., TINA BURGETT, BOISE KIMBER, MALCOLM WEBER, ZELMA TIRADO, AND CITY OF NEW HAVEN,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Equal Protection Clause and Title VII do not allow government employers to use unsupported claims of feared disparate-impact liability to circumvent race-neutral state and local merit systems to racially balance their workforces.

Respondents no longer even attempt to defend the legal immunity for good-faith assertions of voluntary compliance with Title VII that they sought and won in the district court and Second Circuit, and defended in opposing certiorari. See Pet.App. 24a, 43a; BIO 13-14; CA2 Resp.Br. 19-20; Defs.' Memo. in Support of Motion for Summary Judgment (Dkt. No. 52) 18-19. Until now, respondents never argued that they had a strong evidentiary basis for their actions. Instead, they repeatedly acknowledged lacking information to challenge the content-validity of the tests or to substantiate the equal validity or lower adverse impact of any potential alternative. They instead staked their defense on their asserted good-faith belief that equally valid alternatives existed and their desire to "explore" for them.

Abandoning that defense, respondents now attack test validity for the first time, and suggest new alternatives neither the board nor even the district court heard about. But predictable complaints by unhappy test-takers, vague allusions to potential alternatives from IOS's competitor, and the urgings of a city lawyer without expertise in either firefighting or test design could not justify rejecting the results.

Those statements were substantively unfounded and moreover cannot be considered evidence because they were admitted only as state-of-mind hearsay. Respondents' explication of their razor-thin disparate-impact case also improperly ignores the ample contrary evidence that their process of 'questioning' the tests was predetermined. The Court should reject respondents' attempt to assert a newly hatched, previously waived and disclaimed, and completely unsupported fact-intensive defense of the Civil Service Board's decision (including new assertions never made to the board) to reject the promotions.

The weaknesses of respondents' fact-focused arguments highlight the important legal questions respondents attempt to deflect and obscure. While retreating from the blanket good-faith immunity they previously asserted, respondents (and the United States) substitute a supposed hurdle that is effortless to cross. The legal standards they suggest under both Title VII and the Equal Protection Clause would effectively allow government employers to abandon valid employment-test results whenever a mere numerical disparity is accompanied by any critical comments, however cursory, biased, or unsubstantiated. This would encourage government employers to choose numerical racial balancing over merit, negating the benefits civil-service laws provide in ensuring fairness in public employment, to the detriment of public (and first-responder) safety. It would also thwart strict scrutiny's purpose of smoking out illegitimate uses of race by public officials. The Court

should reject those standards and make clear that public employers may burden nonminorities with the weight of remedial measures only on a substantial demonstration that liability likely exists, and only in an appropriately narrowly tailored way.

ARGUMENT

I. RESPONDENTS VIOLATED THE EQUAL PROTECTION CLAUSE.

A. Strict Scrutiny Applies.

Strict scrutiny applies to respondents' refusal to certify the promotional lists because of the race of the eligible individuals. Contrary to respondents' assertion that there were no "state-mandated racial labels" that "determine[d] the allocation of benefits and burdens," Resp.Br. 42, respondents literally assigned the candidates racial labels on race-coded results lists, then determined to deny promotion to successful candidates, and give unsuccessful candidates a do-over, based on those labels and the race of the top-scoring candidates. Respondents' actions relied more heavily on individual racial labeling than the strictly scrutinized actions in other, recent cases in which race was merely one of many factors considered. *E.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

Nor does respondents' equal-treatment argument change the race-based nature of their actions: "racial

classifications receive close scrutiny even when they may be said to burden or benefit the races equally." *Shaw* v. *Reno*, 509 U.S. 630, 651 (1993); accord *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991). Similarly, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), mandates strict scrutiny. Richmond cancelled all bids on a contract because no bidder met the percentage requirements for a minority set-aside. *Id.*, at 483.[1] Respondents cancelled the promotions because they did not meet their requirements for a certain percentage of successful minority candidates.[2] Nor is there any strict-scrutiny exception for *ad hoc*, as opposed to formalized, racial classifications. Indeed respondents' use of the four-fifths guideline is effectively a functional vacancy set-aside.

There is also ample evidence that race motivated respondents' decision. Pet'r.Br. 24-25. Respondents' actions were racially motivated, relied on racial labels, and had differential racial effects—all of which compel the application of strict scrutiny. See, *e.g.*, *Vill. of Arlington Heights* v. *Metro. Hous. Development Corp.*, 429 U.S. 252, 266 (1977) ("The impact of the

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[1] Since all bids were cancelled, respondents are incorrect to claim *Croson* is different because it involved "differential treatment." Resp.Br. 43.

[2] That some minority candidates were successful does not mean the respondents' decision not to promote was non-race-based. There was no suggestion in *Croson*, for example, that the analysis would have differed if the contractor had been rejected for having 10% minority subcontractors instead of the 30% Richmond required.

official action . . . may provide an important starting point."); see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). The successful candidates' race was clearly the "predominant factor" behind the decision not to certify. Pet'r.Br. 10-14, 23; *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion). Nor do respondents' claimed concerns about possible disparate-impact liability or lawsuits somehow make their reasons non-race-based.[3] See *Shaw*, 509 U.S. at 653-654 (rejecting as "flawed" the argument that strict scrutiny did not apply because of the need to "take race into account in order to comply with the Voting Rights Act").

Disfavoring nonminorities by cancelling promotions, to avoid being sued for racial discrimination by minorities for promoting too many nonminorities, is a race-based action. That is especially true because respondents had so little basis beyond raw racial numbers to think that promoting the successful candidates would likely violate 42 U.S.C. §2000e-2(k). See *infra* Part II.B. There is more than enough record evidence—most of which respondents ignore—that respondents' original goal was to cancel the promotions for impermissible race-political reasons, and that they settled on Title VII compliance as a means to achieve that impermissible end. See *Bush*, 517 U.S. at 959 (plurality opinion); see also U.S.Br. 22-24.

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[3] Respondents do not defend the district court's untenable proposition that race-based motivations are subject to strict scrutiny only when there is evidence of "animus." Pet.App. 47a.

Early emails among respondents proposed Title VII compliance as a device to scrap the promotions. Pet.App. 449a, 459a. Before any board meetings, mayoral appointees met with IOS and focused, not on validity, but "racial" and "political" ramifications. Pet.App. 333a-334a, 812a-816a, 882a-883a. The information presented to the board was selectively managed. Pet.App. 228a-229a, 490a-498a, 817a-819a, 845a-852a. The ensuing board inquiry failed to uncover any solid evidence either to conclude that the tests were not content-valid[4] or to present any equally valid alternative with demonstrably lower adverse impact[5] (and, indeed, Hornick recommended the promotions proceed and Lewis opined that the exams were fair and relevant). See *infra* Part II.B; see, *e.g.*, Pet.App. 558a, 566a-568a. Yet the board still refused to certify. And the mayor would have nullified the promotions by fiat if the board had not done so. Pet.App. 590a-591a, 819a-820a. All this, moreover, was in the context of state courts' stern rebukes of New Haven's attempts by "charade" and "subterfuge" to circumvent state merit rules.[6]

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[4] None of respondents' district-court affidavits mentioned any test-validity concerns.

[5] Importantly, respondents misstate the elements of disparate-impact liability, ignoring the additional, clear statutory requirement that "the respondent refuses to adopt such alternative." 42 U.S.C. §2000e-2(k)(1)(A)(ii).

[6] Petitioners do not assert that the state courts had held respondents engaged in the illegal practices for racial reasons; the state courts did not reach that question. Pet'r.Br. 5. But the Connecticut Supreme Court specifically noted that the allegations and evidence about race-based abuse of score banding

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Respondents simply ignore most of petitioners' evidence, recast other evidence in a self-favoring light, and perfunctorily state that no summary-judgment fact issues exist. Resp.Br. 49. Respondents now assert that the only relevant evidence is the rejecting board members' professed reasons for their votes. *Id.* 48-49. But that argument ignores that the board members were appointed by the mayoral administration of which the other respondents were members, that the board vote was part of a process that was instigated and shepherded by the other respondents, including selective management of the information the board received, that respondent Kimber threatened the board members with race-political ramifications if promotions proceeded, and that the mayor stood poised to nullify the board's vote had it gone the "wrong" way. That evidence was relevant to whether the board's decision was tainted by impermissible racial motives. See, *e.g.*, *Back* v. *Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125-126 (CA2 2004) ("[I]t is clear that impermissible bias of a single individual at any stage of the promoting process may taint the ultimate employment decision . . . so long as the individual shown to have the impermissible bias played a meaningful role in the . . . process." (quotation omitted)).[7]

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posited "exactly the abuse of discretion based upon nepotism and racism that the civil service system is meant to prevent." *Kelly* v. *City of New Haven*, 881 A.2d 978, 1000, n.40 (Conn. 2005).

[7] Nor is *City of Mobile* v. *Bolden*, 446 U.S. 55, 74, n.20 (1980), to the contrary. Petitioners' challenge is not to the system

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Respondents devote a great deal of emphasis to slippery-slope arguments that applying strict scrutiny will require strictly scrutinizing a broad range of government practices, and prevent the salutary use of race-conscious proxies. *E.g.*, Resp.Br. 47-48. But a retrospective cancellation of a legally mandated selection process based on the race of the successful is meaningfully different from prospective changes that are made without knowing, and not based on, the races of the individuals who will qualify. That is, as respondents ironically emphasize, "[h]aving decided to use the [test, respondents] must accept the constitutional burdens that come with this decision."[8] *Grutter*, 539 U.S., at 370 (Thomas, J., concurring in part and dissenting in part); Resp.Br. 46. Once the city announced its examination process, allowed and encouraged candidates to "strive" and "study" for three months, Pet.App. 360a, and generated a list of those eligible for promotion, it could not then point to the race of those who would be promoted and reject them because of racial imbalance.

Further, unlike most of the practices respondents claim would be threatened, respondents' actions did not involve the use of generalized race-conscious

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for selecting the mayor or the board, but to the board's decision to nullify the test results—a decision in which the other respondents played a direct and influential part.

[8] The board was *not* deciding whether to use the test, as respondents consistently imply. That decision had already been made. State and local law required competitive job-related tests and the promulgation of the eligibility lists. See Pet'r.Br. 4.

measures such as school-site selection or providing aid generally to the disadvantaged. See *Parents Involved*, 127 S.Ct., at 2792 (Kennedy, J., concurring in part and concurring in the judgment); *Croson*, 488 U.S., at 528 (Scalia, J., concurring in the judgment). Respondents looked at (and only at) the candidates' race, not any proxy. Petitioners' arguments against such pointed, pernicious injuries inflicted on identifiable individuals thus pose no danger to prospective use of generalized race-conscious proxies to achieve legitimate goals.

B. Avoiding an Unsupported Claim of Disparate-Impact Liability Is Not a Compelling Interest.

The Equal Protection Clause does not allow government actors to engage in intentional racial discrimination to counter the effects of adverse impact that may arise from any number of causes other than intentional discrimination by that government entity. The Court has recognized only remedying past intentional discrimination as a compelling interest in the employment context and has never suggested that there is a compelling interest, sufficient to allow intentional racial classifications, in avoiding numerical disparities that do not arise from intentional racial discrimination. See, *e.g.*, *Croson*, 488 U.S., at 507; *Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion). Indeed, *Wygant*, *Croson*, and *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), were all decided against a background of numerical disparities in government contracting and

employment, yet in each the Court specifically determined that government could not act directly to counterbalance those disparities without a strong evidentiary basis that they existed because of the government's own intentional discrimination.

The Court has made clear that the Equal Protection Clause forbids only intentional racial discrimination in governmental employment, not mere disparate impacts. *Washington*, 426 U.S., at 242. Consistent with that bedrock principle, the Court has repeatedly condemned racial balancing and made clear that disparate-impact analysis should not be allowed to develop into a one-way ratchet requiring it. See, *e.g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality opinion). "If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm." *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (CA7 2004). To avoid that result, which this Court has repeatedly condemned, avoiding §2000-e2(k) liability cannot be a compelling state interest.[9]

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[9] Nor are the voting rights cases cited by respondents, Resp.Br. 50-51, to the contrary. Instead, they are consistent with the principle that statutory compliance can be a compelling interest only when accompanied by a need to remedy identified past discrimination. *E.g.*, *League of United Latin American Citizens (LULAC)* v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Moreover, the compelling nature of the State's interest in §5 compliance is supported by our recognition in previous cases that race may be used where necessary to remedy identified past discrimination.").

If avoiding disparate impact ever could be a compelling interest, however, it could only be when the likelihood of liability under §2000e-2(k) is established by a strong basis in evidence. That strong-basis-in-evidence standard requires more than merely a *prima facie* demonstration of numerical imbalance, which may exist as a result of societal factors without any discrimination by the government. The Court has long held that government cannot constitutionally use racial classifications to counteract that imbalance without a demonstration that it is remedying the effects of the government's own intentional discrimination. Otherwise, government actors will be free to engage in intentional racial discrimination and race-balancing based on nothing more than statistical disparity, contrary to the intent of Congress and a long line of cases from this Court. Pet'r.Br. 34-36; *Washington*, 426 U.S., at 242.[10]

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[10] *Croson*'s statement that Richmond's set-aside lacked a strong basis because "there is nothing approaching a *prima facie* case of a constitutional or statutory violation," 488 U.S., at 500, is not to the contrary. Saying there was no strong basis because there was not a even a *prima facie* case is not to say that a *prima facie* case is a strong basis, and indeed the rest of the opinion indicates that a more searching analysis is required. *E.g.*, *id.*, at 501 ("[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."). Moreover, in *Croson*, as elsewhere in this Court's cases, the discussion was about whether there was a strong basis in evidence of past intentional discrimination by the municipality, not evidence of mere numerical disparity. *Ibid.*

Respondents appear to now concede that mere numerical disparity is not enough to constitute a compelling state interest. Resp.Br. 54. They assert that the board was presented with "evidence" of test invalidity and of equally valid less discriminatory alternatives, and they claim petitioners "have identified no evidence that shows concerns about test flaws or alternatives to be ultimately unfounded." *Ibid.* They ignore the evidence marshaled by petitioners that the tests were painstakingly validated, Pet'r.Br. 51-52, not to mention ignoring that their merits brief in this Court is the first time, after repeated explicit concessions that validity was not at issue, that respondents have purported to have acted based on concerns about test validity. *E.g.*, Pet.App. 1024a. This argument also ignores petitioners' detailed explication in their opening brief of the insufficiencies in the evidence of alternatives, including the ways in which it fell far short of applicable EEOC requirements, and the fact that the sole expert who made comments about alternatives expressly recommended that the city proceed with promotions. Pet'r.Br. 52-54. Nor do respondents ever explain how, given that they are no longer defending the district court's rule of immunity for good-faith efforts at complying with Title VII, it was correct for the district court to grant summary judgment on what is, at a bare minimum, a factually contested record on these issues. See *infra* Part II.B.

C. Cancelling the Promotions Was Not Narrowly Tailored.

Finally, even if respondents had a compelling interest in avoiding Title VII disparate-impact liability, their cancellation of the promotions was not the most narrowly tailored way to achieve it. Respondents knew in advance that past exams had demonstrated similar levels of disparate impact, Pet.App. 775a-779a, 950a-957a, 1019a-1020a, and could have taken a number of additional proactive steps to avoid or minimize it. The respondents cite no authority for their proposition that pre-test measures are irrelevant to the tailoring analysis, and there is no basis for such a distinction. Cf., *e.g.*, *Contractors Assn. of E. Pa., Inc.* v. *City of Philadelphia*, 91 F.3d 586, 609 (CA3 1996) (identifying prospective efforts to reduce entry barriers, provide training, and support financing as narrower alternatives to set-aside).[11]

Even after the test, respondents could have tried narrower alternatives. Most obviously, if they really had concerns about test validity (despite disclaiming that continually until now), they could have pursued the narrower alternative of marshaling competent

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[11] The contention in this context that petitioners merely suffered "disappointment," is offensive. Resp.Br. 56; U.S.Br. 31. The petitioners sacrificed greatly to perform well on the tests. See, *e.g.*, Pet.App. 376a-378a, 404a-405a, 407a-408a. Their success entitled them to promotion, with concrete benefits such as increased salary and seniority. Pet'r.Br. 8, 25-26. Nor does the rule of three decrease the certainty that most of the petitioners would have been promoted immediately, especially given the NHFD's practice of promoting in rank order.

evidence to establish the tests' validity, for example by receiving the IOS technical report. See *infra* Part II.B. Even beyond that, there were measures more narrowly tailored than refusing to fill the vacancies, including ones respondents themselves suggest.[12] Resp.Br. 7-8, 35. Cancelling the promotions outright was clearly not the narrowest means for the city to achieve its allegedly compelling interest.

II. RESPONDENTS VIOLATED TITLE VII.

Respondents apparently now agree that an objective standard governs whether a government employer had reason to act to avoid liability under §2000e-2(k). They disagree merely on how much evidence is enough. Petitioners' strong-basis-in-evidence standard is the correct one, because it best harmonizes the several provisions of Title VII while avoiding the negative consequences of a rule that confers a lopsided leeway to throw out test results based on any stray comment about test validity or the possible availability of alternatives. In any event, it is impossible to affirm the summary judgment, given the lack of any evidence substantiating any objective likelihood of disparate-impact liability, respondents' concessions on test validity, and the underlying

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[12] Notably, both suggestions—reweighting, and use of cutoff scores—contradict respondents' claim that the tests might have been invalid.

insufficiency of the materials before the board to show any likelihood of liability.

A. Petitioners' Strong-Basis-in-Evidence Standard Is the Correct Standard.

Title VII neither permits nor immunizes intentional discrimination to avoid potential §2000e-2(k) liability unless there is at least a strong basis in evidence that an actual violation is likely, including a substantial showing on the issues of test invalidity or suitable alternatives. This is particularly so for public employers, who are also subject to the Equal Protection Clause. Petitioners' interpretation of Title VII neither sets the statute against itself nor creates any dilemma for government employers. Instead, it preserves employer flexibility without imposing a one-way ratchet towards race-balancing, carefully balances competing employee interests, respects the bounds imposed by the Constitution, and gives governments desirable incentives to choose the best option among available alternative courses of action. Respondents' approach, in contrast, not only puts §2000e-2(k) into conflict with other subsections of the statute, but confers unconstrained discretion to use mere numerical disparities to discard test results that display the "wrong" racial balance.

As the Court has long recognized, adverse impact can arise from numerous sources, most of which do not reflect employer discrimination and which therefore cannot be remedied by government with racial

classifications. See *Watson*, 487 U.S., at 992 (noting statistical disparities may create "undue pressure" to "adopt inappropriate prophylactic measures" in light of "the myriad of innocent causes that may lead to statistical imbalances"). A demonstration of numeric adverse impact under the EEOC guidelines does not establish or nearly establish liability, but only creates an easily rebuttable presumption, and as such cannot be sufficient to allow employers to intentionally discriminate.[13] Cf. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 576-579 (1978) ("[C]ourts may not impose . . . a remedy [for racial imbalance] on an employer at least until a violation of Title VII has been proved"). It is a much lower bar, for example, than the "threshold conditions" for vote dilution liability under §2 of the Voting Rights Act, to which respondents advert. See *NAACP* v. *City of Niagara*, 65 F.3d 1002, 1019, n.21 (CA2 1995) ("[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of §2 under the totality of the circumstances.").

Respondents' minimal adverse-impact-plus standard, like the United States's reasonable-basis standard, would be deeply harmful and contradict this Court's interpretations of the statute. It would give

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[13] At a minimum, mere numeric disparity is not a strong basis when there is additional evidence of test validity voiding any inference of discrimination from mere numbers. See *Tex. Dept. of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 255 & n.10 (1981).

employers a compelling incentive, when confronted with numbers showing adverse impact, to always abandon valid, fair, and job-related selection procedures merely to forestall dubious disparate-impact claims. "Avoiding disparate impact" would become the very engine for racial balancing that the evidentiary standards for proving disparate impact are intended to prevent. See *Watson*, 487 U.S., at 993. Such results are especially likely because test development and post-test proceedings are solely within the knowledge and control of the government employer. See *Ho ex rel. Ho* v. *San Francisco Unified Sch. Dist.*, 147 F.3d 854, 865 (CA9 1998).

Instead, assessments of whether an employer had a strong basis in evidence to throw out a test to avoid disparate impact must consider whether the employer had, at the time of its decision, reliable information demonstrating either test invalidity or the proven existence of an equally valid alternative with less disparate impact, the refusal of which likely would have resulted in §2000e-2(k) liability.[14] Importantly,

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[14] Neither *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), nor *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979), supports respondents' suggestion that Title VII requires less than the constitutional strong-basis-in-evidence standard. See *Croson*, 488 U.S., at 500. In both cases, employers acted to end manifest imbalances resulting from long histories of job-category segregation that raised strong inferences of past intentional discrimination. *Johnson*, 480 U.S., at 631-632; *Weber*, 443 U.S., at 208-209. Respondents cannot and do not claim such a manifest imbalance in NHFD's ranks, see Pet.App. 945a (disclaiming remedying past discrimination as

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respondents misstate the necessary conditions for disparate-impact liability, repeatedly asserting that the mere existence of an equally valid, less discriminatory alternative is sufficient to establish liability, but ignoring the additional, clear statutory requirement that "the respondent refuses to adopt such alternative." 42 U.S.C. §2000e-2(k)(1)(A)(ii); see Resp.Br. 16, 22, 32. This additional statutory requirement means liability cannot be established—and thus, a sufficient strong basis in evidence for an impending disparate-impact violation cannot be established—by introducing fanciful alternatives for the first time during litigation, as respondents now attempt to do.

Requiring government employers to possess sufficient evidence of an impending disparate-impact violation balances the potentially conflicting demands of Title VII's disparate-treatment and disparate-impact prohibitions. In contrast, respondents' interpretation fosters conflicts between these provisions by encouraging and immunizing conduct that violates §2000e-2(a) in order to avoid the mere potential for disparate-impact claims, even frivolous ones. Indeed, respondents' interpretation introduces significant tensions throughout Congress's statutory scheme—yet they simply fail to respond convincingly to the

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a motivation), perhaps in part because New Haven's rule-of-three already permits exactly the multi-factor evaluation of equally qualified candidates approved in *Johnson*. See 480 U.S., at 625.

ways their interpretation puts §2000e-2(k) in collision with §2000e-2(h), (j), and (*l*). Pet'r.Br. 43-44, 46, 55, 62-66.

Petitioners' rule does not require employers to prove a violation against themselves—indeed, no violation under §2000e-2(k), absent test invalidity, could ever be proven until the employer refused to adopt a demonstratedly suitable alternative. Rather, the employer's burden to justify race-based action may be carried when the employer has sufficient objective and verified information to demonstrate that a disparate-impact violation would likely occur. Requiring a strong basis in evidence directly channels employers' efforts to avoid disparate impact into the least discriminatory means of doing so—for instance, by simply determining that the selection procedure is job-related and consistent with business necessity.

Petitioners' standard will not chill employers' attempts to improve ongoing hiring processes or lead to aggressive uses of race. Neither Title VII nor the Constitution bars prospective measures to reduce disparate impact that do not rely on racial classifications—indeed, respondents engaged in substantial efforts before it gave these tests. See *supra* Part I.A; Pet'r.Br. 6-9. And petitioners' rule actually reduces the incentives government employers would have under respondents' rule to aggressively use race-based measures to "remedy" mere numeric disparities. In contrast, respondents' interpretation of Title VII ignores the clear statutory prohibition on intentional discrimination—and the principle of nondiscrimination that is

the core of Title VII itself—by providing unbounded license to discard the results of fair, job-related selection processes based on no more than predictable levels of adverse impact and the bare assertions of belief that §2000e-2(k) might have been violated.[15]

B. Respondents Lacked a Strong Basis in Evidence to Justify Their Race-Based Actions.

Respondents should not be permitted to whipsaw the courts by asserting arguments that not only were not made below, but were both factually and legally disclaimed. Respondents' defense below, which the district court adopted, was predicated on immunity for subjective good-faith—with good reason, since respondents did not have a strong basis in evidence for their action, as even the district court noted. Pet.App. 34a. Even if it were proper to disregard respondents' concessions, the summary-judgment evidence conclusively shows that respondents completely lacked a strong basis in evidence to conclude that abandoning the tests was necessary to avoid a §2000e-2(k) violation, and strongly indicates that their cancellation of the promotions was impermissible

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[15] Notably, neither respondents nor the United States suggests any limit on permissible remedial actions once the employer has the proper (low, in their view) quantum of evidence. Instead, either would allow (and respondents suggest) acts that would otherwise violate §2000e-2(a), §2000e-2(*l*), state law, and §2000e-7. See *infra* Part II.B; Resp.Br. 32, 35.

intentional race discrimination.[16] Respondents' assertions that there are no disputed facts relevant to either the likelihood of §2000e-2(k) liability or their underlying discriminatory motives rely on an improperly one-sided version of the factual record. *Contra* FED. R. CIV. P. 56(c); *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999).

1. The Numerical Disparity Was Not "Severe."

Statements in the record contradict respondents' claim that the adverse impact was "severe." *Compare* Resp.Br. 27, *with* Pet.App. 555a-556a (Hornick); 677a (Legel); 423a-427a (Egan). The record further shows that earlier captain and lieutenant promotional examinations respectively had comparable and greater adverse impact ratios. Pet.App. 28a, 423a-427a, 678a-679a, 699a-701a. Further, respondents incorrectly imply that no African-American firefighters would

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[16] Respondents insist intent to discriminate must be proven as pretext in the third step of a *McDonnell Douglas* analysis, but this ignores that the purported decision to voluntarily comply with Title VII was driven by petitioners' race. Since a protected trait "actually motivated the employer's decision . . . and had a determinative influence on the outcome," *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993), there was direct and uncontested evidence that petitioners' race motivated the adverse employment decision. But even under the *McDonnell Douglas* framework, there is clearly a genuine issue of material fact on pretext defeating any possibility of awarding respondents summary judgment on this record.

have been eligible for promotion when in fact several would have been promoted within two years of the lists' certification. Pet.App. 235a-236a, 305a-306a, 420a-422a.

2. Respondents Did Not Have an Evidentiary Basis to Conclude That the Tests Were Invalid.

Respondents now attempt to muster purported "evidence" questioning examination validity by cataloguing stray, unsubstantiated remarks to the board and introducing new matters the board never even heard about. But respondents have never previously argued the tests were not job-related or consistent with business necessity. Instead, respondents stated to the district court that "certainly at the time we gave [the exam] we thought it was valid," adding that "we have no information to rebut its validity." Pet.App. 1024a; see also Pet.App. 939a-941a (district-court brief conceding validity).[17] Nor did respondents substantiate the few complaints the board heard or turn them into admissible district-court evidence. Instead, respondents introduced the unsworn hearsay statements not for their truth, but merely to show the subjective good-faith belief that has heretofore been

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[17] Neither of the two board members who voted against certification even mentioned validity in their affidavits. See CA2 J.A. 1604-05, 1610-11.

respondents' sole defense.[18] Pet.App. 14a, 1024a-1025a. Nor did respondents contest validity in the Second Circuit or their brief in opposition.[19] See *Pa. Dept. of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998). This was for good reason—the record shows that in collaboration with city officials, IOS engaged in a careful examination development and validation process that included detailed questionnaires, interviews, ride-along exercises with diverse incumbents, and consultation with top NHFD officials. Pet.App. 150a-154a, 262a-264a, 337a-343a, 597a-650a.

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[18] Indeed, respondents moved the district court to strike evidence regarding test development and validity. *E.g.*, Defs.' Reply to Pls.' Objection to Defs.' Motion to Strike (Dkt. No. 102) 7 ("Evidence of preexamination planning and the test validity is, however, irrelevant because the issue is not whether the tests were valid.").

[19] Respondents' amici's briefs on test validity are thus irrelevant, because they address an issue definitively not before the Court, and by their belatedness deprive the Court of any adversary presentation on the issue. Indeed, the opinions by the five industrial-organizational psychologists have been discredited in the profession. See, *e.g.*, Schmidt, Why All Banding Procedures in Personnel Selection Are Logically Flawed, 8 Human Performance 165 (1995). Further, the fact that employers can so easily find experts to make unsubstantiated criticisms without having seen the tests or any test-development data should emphasize to the Court the need to adopt a meaningful evidentiary standard subject to adversary proof. For example, one of the very amici arguing against written exams here recommended increasing the weight on written exams to 70% in neighboring Bridgeport. *Burke* v. *City of Bridgeport*, No. CV074021941S, 2008 WL 1735584, at *2 (Conn. Super. Ct. 2008).

In any event, the comments at the board meetings gave no basis to question the tests' validity. Failing to acknowledge that Vincent Lewis, the only expert who had actually examined the tests, found the content to be appropriate, Pet.App. 563a-569a, respondents instead highlight statements from a consultant who did not review the tests and a lawyer with no basis to contest them. Respondents' summary of Hornick's statement ignores that he recommended the board certify the eligibility lists and proceed with the promotions. Pet.App. 558a. He stated that the written exams' adverse impact was "generally in the range of what we've seen professionally," Pet.App. 549a, and noted the adverse impact caused by the oral assessment, Pet.App. 550a—which respondents do not even challenge, and hardly mention.

Hornick's general comments about the use of written or multiple-choice exams offered no specific evidence about the tests IOS actually prepared that could support such criticism. Respondents concede Hornick may not even have seen the tests. Pet.App. 1030a. And it is widely acknowledged that written, multiple-choice exams are reliable measures of job knowledge, and widely used in firefighting and other occupations. Cf. Pet.App. 623a-624a. Moreover, substantial evidence in the record, including the predominantly favorable candidate feedback questionnaires, confirms that the tests fairly and validly tested candidates' KSAs. See Pet.App. 329a-335a, 338a, 603a-606a, 633a-634a, 1024a.

As for Ude, he is a lawyer with no experience or knowledge to evaluate content validity, who thus had

no basis to compare these tests to those in *Vulcan Pioneers, Inc.* v. *N.J. Dept. of Civil Service*, 625 F.Supp. 527, 548 (DNJ 1985).

Similarly unfounded is respondents' suggestion (never presented below) that 2 of the 200 written-examination questions were inappropriate. Respondents never attempt to demonstrate how two purportedly irrelevant questions could have invalidated the tests, or changed the outcome. Cf. *id.* at 547 (criticizing allowing "picayune analysis to discredit a prior test" and emphasizing the importance of evaluating "the totality of the test").

Moreover, these two alleged flaws are based not on the actual tests, but on two test-takers' faulty recollections to the board months later. Resp.Br. 29. The complained-of uptown/downtown question was drawn directly from the study text, and simply tested for the knowledge that on a one-way street it is better to park up the street to prevent traffic from interfering with fire operations. *Contrast* J.A. 48 *with* Pet.App. 1094a (filed under seal); V. Dunn, Command and Control of Fires and Emergencies 67 (1999); Pet.App. 354a. The complaint that a test question about traffic collisions misrepresented NHFD procedure is simply wrong—the question never mentioned any "supervisor apparatus," but indeed offered contacting a battalion chief as a response.[20] *Compare* J.A.

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[20] Respondents' low-bar standard would allow drastic remedial action by employers based merely on such unfounded complaints.

44-45 *with* Pet.App. 1131 (filed under seal). Respondents further disregard the procedure, which Legel described to the board, allowing test-takers to challenge exam questions, whereby a legitimate complaint would lead to discarding the question and adjusting all scores. Pet.App. 523a-525a, 647a. There is no evidence the complainants used that process or that respondents made any effort to investigate the two complaints.

Also mistaken are respondents' belated criticisms based on points about which the board never heard but that have recently "come to light." Resp.Br. 30; cf. *Little* v. *Ill. Dept. of Revenue,* 369 F.3d 1007, 1015 (CA7 2004) (explaining that Title VII analysis focuses on decisionmaker's knowledge at the time of decision). For example, there is no merit to respondents' criticism of IOS for not using an Angoff workshop to determine cutoff scores. Legel explained, and it is unrebutted, that "the examinations were calibrated such that minimally qualified job performance equated to the 70% composite [ ] cutoff score" required by the city charter. Pet.App. 77a, 330a. Angoff workshops are used to define cutoff scores for written exams, not oral assessments, and are inappropriate for defining a cutoff for a composite oral/written exam as was used here. See Cizek, Standard Setting, in Handbook of Test Development 224, 238-242 (Downing & Haladyna eds., 2006). Indeed, an Angoff workshop tied to a cutoff score for the written phase was superfluous because all candidates could proceed to

the oral-assessment phase irrespective of their written-examination performance. Pet.App. 160a, 267a-268a, 666a. Nor would altering the composite cutoff score have changed the rank order for promotions.

Respondents criticize the absence of a New Haven reviewer, but fail to acknowledge that the oral assessment was reviewed by a Connecticut fire chief who had assessed prior New Haven exams, Pet.App. 510a-511a, or that the city itself forbade internal review to protect the exams' integrity in light of past alleged security breaches. Pet.App. 508a-509a, 635a-638a. Indeed, the fact that each of the precise factors respondents now criticize was expressly required by the city or the charter, Pet.App. 77a, 308a-328a, reinforces the unworkability of respondents' standard.

Finally, the city's unwillingness to receive IOS's technical report undermines its new claim to have possessed strong evidence the exams were invalid. Respondents now downplay the significance of a report the city regularly receives, Pet.App. 958a-1011a, but IOS described the EEOC-recommended technical report as "a highly particularized and technical overview" that presents "evidence of validity of the examinations for their intended purpose." Pet.App. 330a-331a. Respondents themselves characterized the technical report as a "validation analysis" but said the city did not need one because validity was not the issue, and it was "prepared to explore" equally valid alternatives. Pet.App. 1032a-1033a. The city deliberately rejected information that would have satisfied its burden under *Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 425 (1975), of proving the job-relatedness of the tests and is now attempting to capitalize on its willful ignorance to launch baseless new attacks on validity.

3. Respondents Did Not Have a Strong Basis in Evidence of Examination Alternatives.

The city's assertion of "equally valid, less-discriminatory alternatives" amounts to mere conjecture based on a few passing references to the board. There is no evidence of any specific alternative that the city considered, as §2000e-2(k) would require, nor is there evidence that any alternative was evaluated for content-validity or disparate impact.

It is impossible to reconcile respondents' new position with their old stance and the courts' findings below. Respondents acknowledged that the record on alternatives "admittedly is not vetted out as to the details," Pet.App. 1017a, and that "there really is no testimony that can be offered about the validity of those potential alternative selection methods," Pet.App. 1022a. According to respondents, the availability and validity of alternatives were "questions for a different day." Pet.App. 1027a. They argued that a city need not "have in mind some specific alternative selection method at a time it decides to abandon the results of a promotional exam." Pet.App. 1031a. And the district court expressly recognized "the shortcomings in the evidence on existing, effective

alternatives," but simply (and incorrectly) found them legally irrelevant. Pet.App. 34a.

Lacking concrete alternatives, respondents now mischaracterize Hornick's mention of assessment centers as a fully vetted alternative. Hornick, IOS's direct competitor, Pet.App. 548a; see 29 C.F.R. §1607.9(A), noted without elaboration that assessment centers and situation-judgment tests are alternative methodologies for administering examinations. Pet.App. 557a. Respondents acknowledged to the district court that his statement was "based primarily on the industry situation, not the specific facts at hand." Pet.App. 1029a-1030a. The board never received any explanation of what "assessment centers" and "situation-judgment tests" were, how they differed from the situation-based oral assessment that had been given, their content-validity, or their comparative adverse impact to the examinations that were administered. See Pet.App. 557a, 853a-854a. The district court noted the lack of any explanation about what an assessment-center approach entailed, the lack of any evidence that it had demonstrably less adverse impact, and Hornick's statements that assessment centers can have adverse impact. Pet.App. 32a; see Pet.App. 390a, 592a; see also *Allen* v. *City of Chicago*, 351 F.3d 306, 311 (CA7 2003) (noting disparate impact caused by assessment approach).

As an additional alternative, respondents cite stray comments about written/oral weighting of the exams, which the board never discussed, and certainly did not adopt. See J.A. 65-66, 150. Indeed, Hornick

told the board the oral component may have had an unexpected adverse impact against Hispanics. Pet.App. 550a. In any event, different weighting options are not "alternatives" under §2000e-2(k) because a city would simply be adjusting the relative disparate impact of the two components.[21] See *San Francisco Police Officers Assn.* v. *City & County of San Francisco*, 869 F.2d 1182, 1184 (CA9 1988); *infra* Part II.C. Nor is it obvious such "alternatives" would be equally consistent with business necessity given the substantial discounting of job knowledge caused by deemphasizing the written component.

Respondents' other suggestion—that the city could simply use their preferred version of the rule of three outlawed by the Connecticut Supreme Court—highlights how far they distort the requirements of state and local law. See 42 U.S.C. §2000e-7; *Kelly* v. *City of New Haven*, 881 A.2d 978 (Conn. 2005). The record provides no discussion of the ramifications of such an approach, which was never considered by the board or courts below. Moreover, score banding could violate §2000e-2(*l*) since the adjustment's purpose would be to achieve a desired racial outcome. See

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[21] Nor is it clear it would have reduced disparate impact. Respondents' proposed reweighting would have eliminated two Hispanic captain eligibles, one Hispanic lieutenant eligible, and grouped almost all other minority lieutenant candidates at the bottom of the list, making it less likely they would ever be promoted. See Pet.App. 429a-432a, 434a-436a. These effects demonstrate respondents' commitment to benefiting one racial group at the expense of all others, minority and nonminority alike.

Chicago Firefighters Local 2 v. *City of Chicago*, 249 F.3d 649, 656 (CA7 2001).

Under respondents' approach, a passing reference to any of the countless hypothetical means of administering or scoring a promotional test could justify a city's discarding valid exam results, turning the evidentiary threshold into a gaping loophole that employers could use to race-norm, notwithstanding Congress's clearly expressed intent. Civil-service regimes would be undermined by creating just the kind of discretion to discriminate (and corresponding opportunities for patronage and corruption) that those regimes are intended to curtail, and as a result would also risk public and first-responder safety.

4. Impermissible Racial Motives Guided Respondents.

Even a brief inspection of the record contradicts respondents' untenable claim that there is no evidence of discriminatory motive. See, *e.g.*, Pet.App. 428a-436a, 784a, 826a (circulation of race-coded eligibility lists); 476a (blunt references to the skin color of the top candidates at board meetings); 490a-498a, 780a-781a, 857a-858a (Kimber's racial charges to the board); 410a-412a, 772a-774a, 812a-816a, 841a, 868a-883a, 928a-932a (Kimber's private discussions with city officials, and prior incendiary racial remarks). Summary judgment on the motive issue was clearly improper. *Hunt*, 526 U.S., at 552.

Respondents attempt to distinguish the board members' intent from that of other individual defendants.

But they cannot ignore the totality of forces acting on the board, including the fact that mayoral appointees enjoined the board not to certify the eligibility lists and city officials' advance commitment to ensuring just such a result. Pet.App. 449a, 590a-591a, 819a-820a, 829a, 833a-834a, 849a-850a; J.A. 134, 153. Even the district court agreed that a jury could infer "that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the mayor would incur the wrath of Kimber and other influential leaders of New Haven's African-American community." Pet.App. 49a.

C. Section 2000e-2(*l*) Proscribes Racial Tampering with Test Results.

Respondents avoid substantive discussion of §2000e-2(*l*), fracturing its language to undercut the express prohibition on altering test results. The plain language of the statute prohibits the alteration of test "*results*"—not test scores only, as respondents claim. And respondents' fallback reference to statements in the legislative record that the prohibitions apply only once a test is determined to be employment-related, Resp.Br. 40, is a red herring. Respondents never challenged the validity of the examinations below, see, *e.g.*, Pet.App. 939a-941a, 1023a-1024a, and do not credibly do so now. See *supra* Part II.B. In any event, §2000e-2(*l*) is not limited to applying only after an exam is formally validated.

Notwithstanding petitioners' arguments to the contrary, see, *e.g.*, Pet.App. 1055a-1056a, the district

court made §2000e-2(*l*) aimless surplusage. Shielding the city's race-based negation of test results from the statute's reach would inevitably trivialize the prohibition on "otherwise alter[ing]" test results and allow circumvention of Title VII's racial-tampering ban.

CONCLUSION

For these reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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